SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions Involved	2
Statute Involved	3
Statement of the Case	3
Argument	6
I	
Recoupment of the Reasonable Value of Appointed Counsel Services From Non-Indigent, Acquitted Defendants Does Not Violate Due Process	6
II	
The California Procedure for Determining Whether to Recoup and the Amount of Recoupment Satisfies Due Process	7
III	
Petitioner Howard Was Not Entitled to a Jury Trial on the Amount He Was Required to Repay	9
Conclusion	10

TABLE OF AUTHORITIES CITED

Cases	Page
Day v. Woodworth, 54 U.S. (13 How.) 363 (1851)	10
Fuller v. Oregon, 417 U.S. 40 (1974)	6
People v. Amor, 12 Cal.3d 20, 114 Cal.Rptr. 765, 523 P.2d 1173 (1974)	6, 7, 9
People v. Kozden, 36 Cal.App.3d 918, 111 Cal. Rptr. 826 (1974)	8, 9
Richard v. Richard, 123 Cal.App.2d 900, 267 P. 2d 867 (1954)	8
Ross v. Bernhard, 396 U.S. 531 (1970)	9
Statutes	
California Penal Code, Sec. 245(a)	3
California Penal Code, Sec. 987.8	3, 4, 5, 7
Health and Safety Code, Sec. 11530	3
United States Constitution, Seventh Amendment	9
United States Constitution, Fourteenth Amendment,	2, 7
United States Constitution, Fourteenth Amendment, Sec. 1	2

IN THE

Supreme Court of the United States

October Term, 1974
No. 74-922

DOUGLAS HOWARD,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Five

BRIEF OF RESPONDENT IN OPPOSITION

Opinions Below

The opinions of the California Court of Appeal (App. A to the Petition) is unreported. The California Supreme Court's order denying a petition for hearing is also unreported.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

Petitioner frames the questions as follows:

1. Does the recoupment of the reasonable value of the services of court-appointed counsel from an acquitted criminal defendant found not to be indigent at the conclusion of trial violate due process as guaranteed by the Fourteenth Amendment?

2. Is there a violation of due process under the Fourteenth Amendment if the decision on whether or not to assess costs of counsel services and the amount to be assessed is left to the caprice and arbitrary determination of the judge who heard the criminal case?

3. Does the absence of a right to trial by jury at the recoupment hearing involve a denial of due process or equal protection under the Fourteenth Amendment?

Constitutional Provisions Involved

United States Constitution, Amendment XIV, Section 1, in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statute Involved

California Penal Code Section 987.8 provides:

> "In any case in which a defendant is furnished counsel, either through the public defender or private counsel appointed by the court, upon the conclusion of the criminal proceedings in the trial court, the court shall make a determination of the present ability of the defendant to pay all or a portion of the cost of counsel. If the court determines that the defendant has the present ability to pay all or part of the cost, it shall order him to pay the sum to the county in any installments and manner which it believes reasonable and compatible with his financial ability. Execution may be issued on the order in the same manner as on a judgment in a civil action. The order shall not be enforced by contempt."

Statement of the Case

In an information filed by the Los Angeles County District Attorney, appellant was charged with two counts of assault with a deadly weapon in violation of Penal Code section 245(a). [Cl. Tr. pp. 1-2.] An amendment to the information alleged that appellant had been previously convicted in California of possession of marijuana in violation of Health and Safety Code section 11530, on or about December 31, 1964. [Cl. Tr. p. 3.]

The public defender was appointed to represent appellant. Appellant pleaded not guilty. Appellant was personally advised and put on notice of financial re-

sponsibility under Penal Code section 987.8. [Cl. Tr. p. 4.] Appellant denied the prior conviction. [Cl. Tr. p. 5.] A jury found appellant not guilty with respect to both counts charged in the information. [Cl. Tr. pp. 41-43.]

Appellant filed a waiver of hearing on the determination of his present ability to reimburse the county for the costs of legal services provided. [Cl. Tr. p. 43.] Nevertheless, the court advised appellant that he was entitled to have a hearing on the determination of what was an appropriate fee and on his ability to reimburse the county for the costs of legal services. Appellant stated that he was not working at the present time but that he was supposed to start work after his trial was over. His brother was trying to get him a job with the bus company on 54th and Arlington. [Rep. Tr. p. 4.] The public defender indicated that the investigator for his office has spent eight hours on this case and that he had spent three hours in preparation in addition to trial time. [Rep. Tr. p. 5, lines 2-4.] The trial apparently lasted at least one full day. [*See* Cl. Tr. pp. 11, 43.]

The court felt that appellant had the present ability to reimburse the County of Los Angeles for the cost of legal services provided to him. Although the court felt that the costs were greatly in excess of $500, he fixed $500 as the amount that appellant was obligated to reimburse the county for the costs of legal services. The court further ordered that appellant be permitted to pay

off this amount at $25 a month or more commencing on August 1, 1973. [Rep. Tr. pp. 5-6.]

Prior to the court's having made this order, the following colloquy took place between the court and defense counsel:

> "MR. JACOBS [Deputy Public Defender]: Excuse me. Mr. Howard has asked—I'm not sure where I fit in in this particular situation. Mr. Howard has asked me to ask the Court if there is any sort of indication of how he can pay—
>
> "THE COURT: He can get a job. It's about time he get off the dime and get a job.
>
> "MR. JACOBS: At the present time he does not have one. He hopes to get one, but he doesn't have one at this time.
>
> "THE COURT: I am giving him until August the 1st to raise $25. That's no big deal." [Rep. Tr. p. 5, lines 16-25.]

An appeal was taken from the recoupment order made pursuant to Penal Code section 987.8 in this action. [Cl. Tr. p. 46.] On appeal, the California Court of Appeal unanimously affirmed the recoupment order. Thereafter, on October 30, 1974, the California Supreme Court denied petitioner Howard's petition for a hearing in that court.

ARGUMENT

I

Recoupment of the Reasonable Value of Appointed Counsel Services From Non-Indigent, Acquitted Defendants Does Not Violate Due Process

Petitioner Howard contends that recoupment of the value of appointed counsel services from acquitted defendants violates due process because it imposes a penalty on a defendant found to be not guilty. (Petn., pp. 10-11.) While this Court's decision in *Fuller v. Oregon*, 417 U.S. 40 (1974), does not expressly approve the recoupment of the cost of appointed counsel from non-indigent, acquitted defendants, it clearly forecloses petitioner's argument that the recoupment is a penalty. Concluding that *Fuller* was fundamentally different from decisions "which have invalidated state and federal laws that placed a penalty on the exercise of a constitutional right" (417 U.S. at 54), this Court found that the Oregon statute did not impose a penalty but "merely provides that a convicted defendant who later becomes able to pay for his counsel may be required to do so." (*Id.*)

Respondent submits that the California Supreme Court gave a complete answer to petitioner's contention in the recent case of *People v. Amor*, 12 Cal.3d 20, 114 Cal.Rptr. 765, 523 P.2d 1173 (1974). There the Court stated:

> ". . . no *punishment* of acquitted defendants is authorized by section 987.8. Requiring that a de-

fendant, to the extent that he has the financial ability to do so, reimburse the county for services received does not constitute punishment by any definition ordinarily ascribed to such term. Furthermore, as hereinabove indicated, under the statute the burden of reimbursement is placed upon all indigent defendants according to their ability to pay, and there is no singling out of acquited defendants." (*Id.* at 28-29, 114 Cal. Rptr. at 770, 523 P.2d at 1178.)

II

The California Procedure for Determining Whether to Recoup and the Amount of Recoupment Satisfies Due Process

Petitioner Howard contends that the California recoupment statute permits arbitrary and capricious recoupment orders in violation of minimum due process under the Fourteenth Amendment. (Petn., pp. 3, 12-13.) This contention lacks substance in view of the recent *People v. Amor* decision handed down by the California Supreme Court. There California's highest court held that the requirements of notice and a hearing were to be implied from the due process clause even though California Penal Code section 987.8 did not expressly provide for notice and a hearing. *People v. Amor, supra,* 12 Cal.3d at 30, 114 Cal.Rptr. at 771, 523 P.2d 1179. Indeed, the Court went further and held that ". . . in addition, the rights to discovery, confrontation, cross-examination, and other procedural devices may likewise be implied." (*Id.*)

Furthermore, petitioner Howard is not in a position to object to the lack of a hearing with cross-examination of witnesses and legal rules of evidence (*see* Petn., p. 12) since the opinion of the California Court of Appeal cites that he filed "a waiver of hearing on determination of his present ability to reimburse the County for the costs of legal services provided." (Petn., p. 18.) Rather than presenting the broad due process issue which petitioner Howard urges upon the Court, the very most that this case presents is mere error by the trial court in its determination that petitioner had the ability to repay the County of Los Angeles for public defender services conferred upon him. In *People v. Kozden,* 36 Cal.App.3d 918, 921-22, 111 Cal.Rptr. 826, 827-28 (1974), the California Court of Appeal held that the defendant there lacked "present ability" to pay all or a portion of the cost of counsel where he owned no property and his total monthly income totaled $60 per month. At oral argument in the instant case, respondent conceded the applicability of the *Kozden* rule to petitioner Howard's case. The Court of Appeal affirmed the recoupment order despite this concession, possibly because the issue was not raised by petitioner Howard until he filed his reply brief. It is the general rule in California that matters presented for the first time in an appellant's closing or reply brief will not be considered by an appellate court. *Richard v. Richard,* 123 Cal.App.2d 900, 903, 267 P.2d 867, 868-69 (1954).

In any event, this case does not present an issue as to the constitutionality of the California standard for determining ability to pay at the conclusion of criminal proceedings. It raises only the narrow question of whether the court below misapplied the applicable California standard. Even if the California Court of Appeal decided this narrow question erroneously, respondent submits that the correction of mere error in this case does not present an important question for decision by this Court.

With respect to petitioner Howard's claim that the California standard of "present ability to repay" is vague (Petn., pp. 13-14), the *Kozden* case, *supra*, sets forth a clear standard. *See also People v. Amor, supra*, 12 Cal.3d at 30, 114 Cal.Rptr. at 771, 523 P. 2d at 1179.

III

Petitioner Howard Was Not Entitled to a Jury Trial on the Amount He Was Required to Repay

Petitioner Howard contends that he was entitled to a jury trial on the issue of the amount to be recouped. (Petn., pp. 14-15.) He may, however, have waived his right to jury trial in this civil proceeding by his waiver of hearing. (*See* Petn., p. 18.) Moreover, his right to jury trial under the Seventh Amendment to the United States Constitution is the right as it existed at common law at the time the Constitution was adopted. *Ross v. Bernhard*, 396 U.S. 531, 533 (1970). At that time, the common law did not provide for the awarding of

costs or attorney's fees to either party, and consequently there was no right to have a jury to assess counsel fees. *Day v. Woodworth*, 54 U.S. (13 How.) 363, 372 (1851).

Conclusion

For the foregoing reasons, respondent urges that the petition for writ of certiorari be denied.

Respectfully submitted,

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